UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

J.T. THORPE AND SON, INC.,

and

Cases 27-CA-21099 27-CA-21196 27-CA-21212

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 295,

Nancy S. Brandt, Atty., NLRB Region 27 Denver, Colorado, for General Counsel.

Jeffery R. Price and Daniel R. Widdison, Attys. (Bostwick & Price) Salt Lake City, Utah, for Respondent.

Russell T. Monahan, Atty. (Cook & Monahan, P.C.) Salt Lake City, Utah, for Charging Party.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at Salt Lake City, Utah, on August 26 and 27, 2009. The portion of the General Counsel's June 24, 2009, consolidated complaint left to be decided here alleges that J.T. Thorpe and Son, Inc. (Thorpe, Company, or Respondent) withdrew recognition of Laborers' International Union of North America, Local 295 (Local 295, Union, or Charging Party), ceased giving effect to the parties' expired collective bargaining agreement, recognized entered into a labor agreement with another labor organization, and made certain unilateral changes to its terms of employment in violation of Section 8(a)(1) and (5) of the Act.¹ The outcome of this labor dispute turns on whether Thorpe recognized Local 295 as the Section 9(a) representative of its mason tender employees in 2003 as claimed by the General Counsel and Local 295.

On the entire record, including my observation of the demeanor of the witnesses, and after carefully considering the arguments in the briefs filed by the General Counsel, Thorpe, and

¹ Originally the consolidated complaint included other allegations arising from the Local 295's charge in Case 27-CB-5129 that pertained to the recognition of the International Union of Public and Industrial Workers (IUPIW) as the exclusive representative of the unit employees involved here. Prior to the hearing, the regional director approved a settlement agreement in that case that resolved and severed the issues presented in paragraph 10(a), (b) and (c) of the consolidated complaint. Following the hearing, I approved an all-party, partial settlement agreement in Case 27-CA-21196, that resolved and withdrew the allegations contained in paragraphs 9(c) through 9(f), and paragraphs 11(a) and 11(b) of the consolidated complaint.

Local 295, I conclude that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from Local 295, a Section 9(a) representative, and by changing the existing terms of employment in the most recent collective bargaining agreement based on the following:²

Findings of Fact

I. Relevant Facts

Thorpe, a construction industry employer incorporated in California, supplies and installs refractory, acid resistant, and fireproofing materials.³ Thorpe maintains an office and place of business at Salt Lake City, Utah, the only facility involved in this proceeding, where it annually purchases and receives goods, supplies, and materials valued in excess of \$50,000 directly from points located outside the State of Utah.

From at least the 1990s onward, Thorpe and two other area contractors, Western Refractory (Western) and Judd Jones (Jones), negotiated a series of successive collective bargaining agreements with Local 295 known as the Mason Tender & Refractory Agreements (MTA or mason tender agreements).⁴ These agreements established the wages, hours, and other terms and conditions of employment for their mason tenders in this appropriate unit:

All employees wherever and whenever employed by the Employer as Mason Tenders and any other classifications of employees employed to do work within the work jurisdiction of Local No. 295 as determined by the Laborers' International Union of North America concerning work jurisdiction.

Local 295's geographical "work jurisdiction" in Utah is statewide. Throughout its bargaining relationship with these contractors, Local 295 referred numerous employees from its hiring hall, many of whom admittedly belonged to Local 295, for employment with the three signatory MTA contractors.

The most recent collective bargaining agreement between Thorpe and Local 295 expired by its terms on December 5, 2008. (Jt. Exh. 1) By letter dated September 4, 2008, Local 295's business manager, Michael Madrid, notified Thorpe that the union that it wanted to negotiate a new agreement. (Jt. Exh. 7) In a letter dated September 26, Ryan Davis, Thorpe's regional manager, notified Local 295 that the company intended to terminate "all Collective Bargaining agreements" and "affiliations" with Local 295 when the existing MTA expired. (Jt. Exh. 8)

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² The findings here incorporate the credibility resolutions I have made. My credibility conclusions have been informed by the following factors: the witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; witness bias; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence; if any; the inherent probabilities; reasonable inferences available from the record as a whole; the weight of the evidence; and witness demeanor while testifying. More detailed discussions of specific credibility resolutions appear below in those situations that I perceived to be of particular significance.

³ Thorpe is a subsidiary of Terra Millennium Corporation.

⁴ Although the three contractors negotiated together, no multi-employer agreement or organization exists. At the conclusion of the negotiations for a successor MTA, each signed a separate contract with Local 295 apparently containing identical terms.

On October 2, 2008, Madrid responded to Davis' termination notice by claiming that Thorpe was bound "to an agreement under section 9(a) of the National Labor Relations Act and warned him against making any unilateral changes without affording Local 295 with an opportunity to bargain. (Jt. Exh. 9) In a letter dated October 17, Thorpe's labor counsel disputed Madrid's assertion that the 2006-2008 MTA was Section 9(a) agreement. Thorpe's counsel went on to assert that the existing agreement "is presumed to be a pre-hire agreement arising under Section 8(f) because "there has never been any showing, or any offer of a showing by the Union of support by a majority of employees in an appropriate bargaining unit as required under Section 9 of the Act." Counsel's letter promised to make no unilateral changes during the remaining term of the MTA but reiterated Davis' earlier message that Thorpe "has no intent or desire to continue in a bargaining relationship with your Union after the expiration of the (existing mason tender agreement)." (Jt. Exh. 10) Thorpe's counsel and Local 295 president, Georg Erichson, exchanged further correspondence arguing about the statutory character of the existing agreement. Erichson asserted that Local 295 became the 9(a) representative in the course of the 2003 negotiations. Thorpe's counsel continued to argue that Local 295 had never demonstrated its majority standing by any means. (Jt. Exh. 11, 12, and 13)

On November 19, Local 295 filed a petition for an election in 27-RC-8545. (Jt. Exh. 14) An election was conducted pursuant to that petition but the ballots have been impounded pending the outcome of this matter. Thorpe admits that as of December 5, it withdrew recognition of Local 295 as the representative of the mason tenders unit and since that date it had not continued in effect the terms of the mason tenders' agreement including the health and welfare, pension, training, and vacation benefits. (GC Exh. 1(z), para 8) In addition, Thorpe admits that after December 5, it granted wage increases to some of its mason tender employees. (Jt. Exh. 23, p. 1) Thorpe also admits that after December 5, it recognized the International Union of Public and Industrial Workers (IUPIW) as the representative of its mason tenders and entered into a collective bargaining agreement with that union covering those employees. (GC Exh. 1(z), para. 9(a) and (b)) The union filed the charge in 27-CA-21099 on December 18 alleging that the Thorpe refused to bargain with Local 295 upon expiration of the 2005-2008 MTA and repudiated Local 295's status as the Section 9(a) representative. The charges in 27-CA-21196 and 21212 were filed on April 8 and April 17, 2009, respectively. Those charges allege that Thorpe pressured and intimidated employees to becoming members of the IUPIW.

Based on the foregoing, the principal issue in this case is whether, as claimed by the General Counsel and the Union, Thorpe recognized Local 295 as the Section 9(a) representative commencing in 2003.

II. The 2003 Negotiations

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Beginning with the MTA effective October 1, 1995 and continuing until the MTA effective March 1, 2003, the relevant contractual recognition language (Article III) accorded Local 295 recognition pursuant to Section 8(f) of the Act. The relevant language read as follows:

Section 1. The Employer understands the Union represents the majority of its employees and recognizes the Union as the sole and exclusive collective bargaining representative of all employees wherever and whenever employed by the Employer during the term of this Agreement as Mason Tenders and any other classifications of employees employed to do work within the work jurisdiction of Local No. 295 as determined by the Laborers' International Union of North America concerning work jurisdiction.

* * *

Section 3: The Employer agrees that, upon the union's presentation of evidence of majority status among employees in the bargaining unit described herein, the Employer will (voluntarily) recognize the Union as exclusive bargaining agent pursuant to Section 9(a) of the National Labor Relations Act for all employees within the bargaining unit on all present and future job sites within the jurisdiction of the Union.

See Joint. Exhibits 4, 5, and 6.

Beginning with the 2003–2005 MTA, executed by Thorpe's representative on or about March 6, 2003, and continuing with the two successive agreements, the recognition language in the Article III, Section 3, changed to the following:

Section 3: The Employer agrees that, the union has a majority status among employees in the bargaining unit described herein, and the Employer recognizes the Union as exclusive bargaining agent pursuant to Section 9(a) of the National Labor Relations Act for all employees within the bargaining unit on all present and future job sites within the jurisdiction of the Union.

See Joint Exhibits 1, 2, and 3.

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The parties began negotiating for a successor agreement near the end of the 2000-2003 MTRA. They concluded an agreement after three face-to-face bargaining sessions on February 5, 17, and 24. The task of preparing the final agreement for signature fell to Local 295.

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As in past years, Thorpe, Western, and Jones bargained jointly with Local 295. The contractors selected David Miller, Thorpe's territorial manager in 2003, as their informal spokesman. Maynard Anderson, Thorpe's manpower, safety, and warehouse manager at the time, also attended all three sessions.⁵ Richard Altenreid, manager of Western's Salt Lake City office, and Judd Jones on behalf of his own company also attended all three sessions. Walt Jones, formerly a salesman for Western, joined Altenreid for the session on February 24. Ross Williams, Local 295's business manager at the time served as the union's spokesman. Mike Madrid, at the time a Union field agent, attended all three sessions, and Georg Erickson, at the time a Union field agent and organizer, attended the last two sessions.⁶

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All agree that the economic issues dominated the negotiations. At the end of the February 5 meeting, the parties agreed to postpone further meetings until the contractors concluded their concurrent negotiations with the bricklayers. Direct negotiations commenced again on February 17 but no agreement was reached. Williams and Miller met separately on February 18 to haggle further over the economic issues. Williams sought to have the

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⁵ As Thorpe's territorial manager, Miller oversaw the operations of that firm's two regional offices in Salt Lake City, and Arizona. Anderson position in 2003 involved a degree of human resources management. Although Anderson did not administer union contracts for Thorpe, he "review(ed) contracts and ke(pt) an archive of contracts for the various unions and groups across the country." Tr. 433-34. No other participant on the contractor's side of the table professed any specialized knowledge or experience in human resources or labor relations management; instead, they all essentially oversaw the operational functions, including Judd Jones, who owned his own firm.

⁶ My findings as to those in attendance at the face-to-face bargaining sessions rests primarily on Madrid's contemporaneous notes prepared at the bargaining sessions. See GC Exhibits 10 through 12.

contractors increase their economic offer from 35 cents to 40 cents per hour. By the end of their meeting Miller agreed to discuss the union's proposal with the other contractors and get back to Williams. The following day Miller telephoned Williams with the news that the contractors would not increase their proposal. That evening Williams met with some of the employees from Thorpe and Western who authorized him to accept the contractors' offer. The following day Williams contacted Anderson about arranging another bargaining session. Eventually, arrangements were made to meet on February 24 at the union's office.

The vast majority of the time at the February 24 session was consumed with getting the details of the economic issues ironed out. After that, Williams proposed that the contractors recognize Local 295 as the 9(a) representative of the contractor's mason tenders. Estimates by the contractors' witnesses indicate that this discussion probably consumed no more than two minutes out of a two hour meeting. Anderson recalled that the union representatives distributed a written copy of their proposal to modify the existing Article III, Section 3, language to the contractors when they arrived at the union's office for the meeting.

Two factors motivated Williams' proposal to change the recognition language. First, for some time officials of Local 295's parent organization had been pressuring the local unions to pursue Section 9(a) in response to the Board's *Deklewa* decision.⁷ In addition, Williams had become concerned that Thorpe might be phased out after another Terra Millennium subsidiary, Brahama Group, Inc., began operating from Thorpe's Salt Lake City office during this period.

In anticipation of making the 9(a) proposal, Williams and the Local 295 field agents Madrid and Erichson began collecting signed authorization cards from the Thorpe and Western Refractory employees during their regular job site visits in late January and early February. They also obtained signed authorizations at the meeting William held with the unit employees on February 19. Williams readily acknowledged that the Local 295 agents never obtained authorizations from any Judd Jones' employees because that contractor had no work underway in Utah at that time.

During the four-month period from December 2002 through March 2003, Thorpe's reports to the union's trust funds show that the company employed a range of unit employees from a high of 44 in December 2002 to a low of 32 in February 2003.. Thorpe reported 42 unit employees in March 2003 when the 2003-2005 MTA was executed. Twenty-six Thorpe employees appear on the reports for all four months. Williams, Madrid, and Erichson claim that virtually all of the laborers they solicited signed Local 295's authorizations but by the time of this hearing, the authorization cards executed during this period could not be located.⁸

All of the 2003 bargaining participants agree that Williams proposed that the contractors recognize Local 295 as the 9(a) representative. Judd Jones vaguely remembered the discussion but could not remember during which meeting it occurred. Miller, Anderson, and Altenreid all recalled, in agreement with the union representatives, that Williams made this proposal at the February 24 meeting. Anderson recalled that the Local 295 agents distributed

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⁷ John Deklewa & Sons, 282 NLRB 1375 (1987).

⁸ Williams said that he left his 2003 MTA bargaining notes and the authorizations cards in the business manager's office files when he retired in 2004. Rod Ewell succeeded Williams and remodeled the business manager's office after taking over. In the process, he discarded some of the office files. Ewell did not testify. Madrid succeeded Ewell when he retired in April 2008.

written copies of the proposed revision of Article III, Section 3, to the contractors when they arrived for the February 24 session.⁹

Williams, whose testimony on this score I credit, said he brought the authorization cards that the Local 295 agents had recently solicited from the Thorpe and Western employees in to the meeting in anticipation of making the 9(a) proposal. Williams recalled that he had them separated by contractor and bound together with a rubber band. Union agents Madrid and Erichson corroborate Williams' claim about the presence of the authorization cards at the February 24 meeting. The various contractor representatives vacillated between claims that they could not recall seeing any authorization cards and claims couched in tones of certainty that they never saw any authorization cards at the February 24 meeting.¹⁰

After the parties resolved their outstanding economic issues, Williams requested that the contractors agree to his proposed revision of Article III, Section 3. Miller asked Williams to explain what the proposed change meant. He told them that they were "currently . . . under an 8(f) agreement" and he was proposing a change to a 9(a) agreement. Williams recalled one of the contractor representatives then asked for an explanation of the difference. In response, he told the contractors that they had no obligation to negotiate further once an 8(f) agreement expired but under a 9(a) agreement, they would be "bound to either negotiate a successor agreement, bargain to impasse or the employees could hold an election to vote us out." He told the contractors that Local 295 had signed authorizations from "a vast majority" of employees and he offered to show them the cards he brought to the meeting. Williams recalled that he told the contractors how many of their employees had signed authorization card but by the time of the hearing he could not recall the specific numbers. He also told the contractors that he was confident Local 295 would win an election if they filed a NLRB petition.

⁹ None of the Local 295 witnesses mention the distribution of a written recognition proposal at the February 24 meeting. Williams recalled that the proposal was initially made verbally but he also said that the contractors had the written copy of the final agreement containing the new Article III, Section 3 recognition language for several days before they signed it. Tr. 53.

¹⁰ I have credited Williams' testimony about the authorizations cards at the February 24 meeting because it struck me as free of exaggeration, authentic, and quite probable. The recollection from some of the witnesses on the contractors' side of the table that Williams made some mention of "voting" reinforces Williams' testimony about his claim that Local 295 would win handily if he petitioned for an election. I find it improbable that such an assertion would have occurred had Williams not been confident that he had signed authorizations from a "vast majority" of the employees as he asserted. And the fact that Miller later conferred with the company's attorney about the 9(a) recognition proposal raised at the February 24 meeting and then signed the new contract containing the revised recognition language without challenging Local 295 to prove its majority status lends credence, in my judgment, to the claim by the Local 295 witnesses that the piles of authorization cards present at the February 24 meeting were prominently displayed to the contractors' representatives and Williams' assertion that he told the contractors the specific number of employees who had signed the authorizations.

¹¹ Williams was less than certain that Miller requested an explanation for the MTA Section 3 revision. Anderson claimed that he read over the written proposal, pointed out the 9(a) language to Miller, and suggested that Miller ask for an explanation which Miller did. Anderson said the reference to 9(a) attracted his attention because he had not seen that reference before. In fact, Article III, Section 3, always contained a reference to 9(a). None of the agreements in evidence contain any reference to Section 8(f).

Union agents Madrid and Erichson provided substantial corroboration for Williams' account. They remembered that Williams discussed the cards in the course talking about the 9(a) proposal at the bargaining table. Madrid recalled that Williams picked the cards up and set them down and stated that Local 295 could file for an election. Erichson remembered that Williams offered the authorization cards to the contractors but he could not recall that the contractors ever looked at them.

Following the proposal, the contractors' side asked for a caucus and the union agents left the room. Williams said that he left the cards on the table in front of his other documents. After the caucus, Williams said that Miller told the union negotiators that the contractors needed a few days to check out whether William's explanation about the difference between 8(f) and 9(a) was true and, if so, they would go along with his proposal. Madrid and Erichson also asserted that Miller agreed to the 9(a) language change if Williams' explanation checked out. Madrid's 2003 bargaining notes concerning the February 24 meeting (General Counsel Exhibit 12) state:

Union - Ross proposed take the .35 per year for 2 years and change the Agreement to a 9-A

Co. Dave Miller said ok to the proposal. They asked for a few days to check out the status from 8-F to 9-A.

Erichson remembered that Williams raised the 9(a) issue toward the end of the meeting and that there was neither an agreement nor a disagreement at the time but a contingent understanding about the proposal. Following the meeting, Erichson e-mailed Anderson a copy of Sections 8(f) and 9(a) language that he obtained from the NLRB's web site.

After the February 24 bargaining session, Williams and an office assistant prepared a final draft of the new agreement and sent it to the contractors for review. On March 3, Williams spoke with Miller about the draft. Without discussing any particular change, Miller told Williams that the draft was okay and that the contract should be printed for signature. Miller acknowledged that he spoke with the company's attorney about the 9(a) recognition proposal following the February 24 meeting but he had no recollection that he spoke to William after the February 24 meeting. However, on March 6, Miller executed the 2003-2005 MTA on Thorpe's behalf that contained the revised language in Article III, Section 3. His predecessors signed two more agreements on Thorpe's behalf containing the same Article III, Section 3 provision that first appeared in the 2003-2005 MTA.

III. Further Findings, Argument, and Conclusions

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The portion of Section 8(f) of the Act relevant here provides that "(i)t shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by

¹² I found Miller's recollection about the events that transpired through this period of 2003 particularly unreliable and easily the worst of all of the contractor witnesses. By way of example, Miller at one point testified that he could not recall if the economic package amounted to "35 cents or \$3.50" (Tr. 492) even though the other contractor representatives described the monetary package as the overwhelmingly dominant aspect of the 2003 negotiations.

any action defined in section 8(a) . . .) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement" The relevant portion of Section 9(a) of the Act provides that "(r)epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" As will be seen from the discussion of the case law below, once a labor organization becomes a 9(a) representative by demonstrating its majority status in an appropriate unit, it enjoys a rebuttable presumption that its majority standing continues. One effect of this presumption is that an employer remains obliged to bargain with that labor organization following the expiration of a collective bargaining agreement.

In *Deklewa*, the Board sought to address the "serious shortcomings" that emerged from various prior decisions interpreting and applying Section 8(f). Beginning with *Deklewa*, the Board presumed that a relationship between a union and a construction industry employer was governed by Section 8(f) and that a party asserting the existence of a 9(a) relationship had the burden of proving it. 282 NLRB 1385, fn. 41. The Board said in *Deklewa* that a union had two options for overcoming the 8(f) presumption and proving that a 9(a) relationship existed: (1) a statutory certification following a Board conducted election under Section 9 (282 NLRB 1385-86); or (2) voluntary recognition by the employer based on proof, such as valid authorization cards, that it represented a majority of the unit employees (282 NLRB 1387, fn.53). *Deklewa* and its progeny required a union to show three things to prove its 9(a) status by way of the voluntary recognition option: (1) the union's unequivocal demand for recognition as the 9(a) representative; (2) the employer's unequivocal and voluntary grant of such recognition; and (3) a contemporaneous showing of majority support. See *Triple C Maintenance, Inc.*, 219 F.3d 1147, 1152-53 (10th Cir. 2000).

In this case, the parties have fashioned various arguments concerning the outcome from the Board's more recent decision in *Staunton Fuel & Material, Inc.*, (a/k/a Central Illinois Construction), 335 NLRB 717 (2001) (*Staunton Fuel*), a case in which the Board set forth minimum requirements of a written recognition agreement in order for a union to be recognized as the 9(a) representative without resort to extrinsic evidence. The General Counsel and Local 295 claim that the parties established a 9(a) relationship in February and March 2003 when they negotiated and executed the 2003-2005 MTA.

However, Local 295 argues that the recognition language used in the MTA contract executed in 2003 "established, at least facially, a 9(a) relationship" and that Thorpe "should be barred from attacking the relationship based on a lack of majority status." The General Counsel argues that the recognition language from 2003 onward is not sufficient by itself to meet the *Staunton* requirements but, when that MTA recognition language is considered together with the extrinsic evidence surrounding the 2003 negotiations, the parties' intent to establish a 9(a) relationship in the 2003-2005 MTRA is clear. Alternatively, Local 295 would join the General Counsel's argument.

By contrast, Respondent argues that the recognition language in the 2003-2005 MTA fails to meet the *Staunton Fuel* requirements, and that the "General Counsel's resort to extrinsic evidence of matters not related to *Staunton Fuel's* three-prong test is inappropriate and inadmissible to prove such a conversion occurred."

Although I agree that *Staunton Fuel* is important to the outcome here I do not share the parties' views that it amounts to the controlling precedent in this case.

The employer and the union in *Staunton Fuel* executed a three-year collective bargaining agreement that carried over language from prior agreements recognizing the union "as the sole and exclusive collective bargaining agent." The newly executed agreement also provided that the employer recognized the union "as the Majority Representative of all employees (in the appropriate bargaining unit)." When that contract expired, the employer withdrew further recognition of the union and made a number of unilateral changes. Subsequently, the General Counsel issued a complaint based on the union's charge alleging that the employer's conduct violated Section 8(a)(5). The administrative law judge reasoned in her decision that the contractual recognition language and existing Board precedent supported a conclusion that the union had become a Section 9(a) representative when the new three-year agreement was executed. The judge also concluded that the employer was time barred under Section 10(b) from challenging the union's 9(a) status.

The employer filed exceptions to the judge's determinations with the Board. The Board, acknowledging that its recent decisions on this subject had not always been enforced by the courts, addressed the difficulties presented by post-*Deklewa* cases in determining from contract language "what constitutes voluntary 'recognition' by an employer 'based on a clear showing of majority support among the union employees'" within the meaning of *Deklewa*. As noted before, the Board's *Staunton Fuel* decision sought to define "the *minimum* requirements for what must be stated in a written recognition agreement or contract clause in order for a union to attain 9(a) status solely on the basis of such an agreement." (Emphasis mine) Those minimum requirements, the Board said, will be met where the contract language "unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support."

Based on these requirements, I find that the contractual language in the 2003-2005 MTA fails to satisfy the requirements of *Staunton Fuel* because Article III, Section 3, does not provide that the 9(a) recognition was based on "the union's having shown, or having offered to show, evidence of its majority support" or something approximating that type of language. For that, the General Counsel offered extrinsic evidence from the February 24, 2003, bargaining session to establish this missing *Staunton Fuel* element. Although resort to extrinsic evidence is always permitted to establish the existence of a Section 9(a) relationship (335 NLRB 720, fn. 15), where, as here, that becomes necessary, the case ceases to be governed by *Staunton Fuel* because the existence of the 9(a) status cannot be discerned solely from contractual language.

Local 295's contention that the contractual language suffices in this case, rests largely on the rationale of the Tenth Circuit in the *Triple C Maintenance* case. There, the employer executed a series of successive short-term agreements stating that it recognized the union "as the sole and exclusive bargaining agent for employees in a unit appropriate for bargaining within the meaning of 9(a)" and "this recognition [was] predicated on a clear showing of majority support for [the Union] indicated by [the] bargaining unit employees." *Triple C Maintenance*, 219 F.3d 1150. Although it is possible to infer in this case by comparing the pre-2003 Section 3 recognition language with the Section 3 language in 2003 MTA and its successors that Local 295 must have presented Thorpe with "evidence of (its) majority status among employees in the bargaining unit" (Local 295's Br., p. 3), no explicit statement to that effect is ever made in an MTA purporting to grant recognition pursuant to Section 9(a).

Moreover, I find good reason here to reject any suggestion that Local 295's 9(a) status should determined solely on the basis of the contractual language under any rationale. Under

Deklewa, the appropriate unit for determining majority status in the 8(f) situation is normally a single employer unit even in those situations where a single employer unit may have been merged into a multiemployer unit. 282 NLRB 1385. The evidence here infers that in March 2003 Thorpe, Western, and Jones, consistent with their past practice, executed separate but identical agreements. If so, Local 295's admission that it had no authorization cards from Jones' employees effectively nullifies the contractual recognition language in the 2003-2005 MTA at least as to Judd. In these circumstances, I find that reliance solely on the MTA's contractual recognition language to establish a Section 9(a) relationship would be inappropriate.

However, I find in this case that the extrinsic evidence adduced by the General Counsel establishes that Local 295 satisfied the agreed-upon condition in the parties' pre-2003 MTAs and, therefore, I recommend that the Board give effect to the 9(a) recognition language in the mason tender agreements between Thorpe and Local 295 from 2003 onward. The factual situation here is analogous to that found in *Goodless Electric Co.*, 321 NLRB 64 (1996) (*Goodless I*), where the employer signed a letter of assent in July 1992 agreeing to follow a multiemployer agreement. But, as I will summarize below, the *Goodless* case has a long, problematic history that at first blush might lead some to conclude that it lacks viability as controlling Board precedent. However, I have concluded that the framework ultimately established by the Board in the *Goodless* litigation, together with the Board's reference to that framework in *Staunton Fuel* represents binding Board precedent even though a court of appeals twice refused to enforce the Board's order in that litigation.

The letter of assent in Goodless contained recognition language providing "that if a majority of its employees authorize the Local Union to represent them in collective bargaining. the Employer will recognize the Local Union as the NLRA Section 9(a) (representative)." Near the end of the contract term, the employer told the union on more than one occasion that it planned to terminate its relationship with the union when the contract expired on June 30, 1993. Six days prior to the contractual expiration date, the employer's entire work force signed authorization cards designating the union as their collective bargaining representative. The following day the union asserted that the employees wanted to union to continue representing them and presented the cards to the employer to prove that claim. The employer examined the cards and independently verified them. Subsequently, the parties extended their agreement for six months. Just prior to the expiration of the extension, around the time when the employer again began to threaten the withdrawal of recognition, all but one of the employees signed and submitted a union form letter inviting the employer to contact their union agent if it wanted to discuss any matters concerning their wages or terms and conditions of employment because they intended to continue their union membership and they expected the employer to continue to comply with the union contract. Despite all of this, the employer withdrew recognition at the end of the extension period, and made several unilateral changes.

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On these facts, the Board found in *Goodless I* that the employer violated Section 8(a)(5) by withdrawing recognition and implementing new employment terms at the end of the sixmonth extension period.¹³ It concluded that the letter of assent recognition language constituted, for the remainder of its term, both a continuing request for recognition and a continuing, enforceable promise by the employer to grant voluntary 9(a) recognition if the union demonstrated majority support. Viewing the recognition language in this manner, the Board found that the union "has proved that it met all of the Board's requirements for establishment of a 9(a) relationship" as of June 25, 1993, when the union presented the employer with signed authorization cards from all of the unit employees. The Board found that the union enjoyed a

¹³ Goodless also involved constructive discharge issues not relevant here.

rebuttable presumption of majority status as the 9(a) representative when the contract expired. Because the employer failed to rebut that presumption, the Board held that it could not lawfully alter the terms and conditions of employment unilaterally.

A court of appeals panel denied enforcement of the Board's order. *NLRB v. Goodless Elec. Co., Inc.*, 124 F.3d 322 (1st Cir. 1997) (*Goodless II*). The court rejected the Board's conclusion that the recognition language constituted a continuing demand for recognition and a continuing, enforceable promise to grant voluntary recognition if the union demonstrated majority support. Ibid at 330. Without that essential construction of the contract language, the court held that the Board had failed to explain why it departed from its own post-*Deklewa* precedent requiring that, in voluntary recognition cases, the demand and the recognition "must be based on a contemporaneous showing that the union enjoys majority support of the employers' workforce" Ibid. at 328-29. The court reversed and remanded the case to the Board "for further proceedings in accordance with (its) opinion."

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On remand, the Board acknowledged that the court's opinion constituted the law of the case but used the occasion to "provide the explanation" the court found missing from its *Goodless I* decision for not following its post-*Deklewa* precedent relating to voluntary recognition. *Goodless Electric Co.*, 332 NLRB 1035, 1037 (2000) (*Goodless III*). In *Goodless III*, the Board said:

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(I)n the construction industry, as in other industries, agreements for future 9(a) recognition are permissible and do not depend for their validity on showing of majority status at the time of the execution of the agreement. * * * (W)here, as here, the parties' agreement so specifies, the union's providing the employer with reliable evidence of its majority status during the term of the 8(f) agreement is sufficient to trigger the employer's contractual obligation to grant 9(a) recognition to the union.

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acquired store" clauses in the retail industry that require an employer to recognize the union as the 9(a) representative of employees at stores acquired or opened after the parties sign a contract if the union later demonstrates that it represents a majority of the employees at the after-acquired location. In support, the Board cited its decisions in *Snow & Sons*, 134 NLRB 709 (1961), enf'd. 308 F.2d 687 (9th Cir. 1962), and *Kroger Co*. 219 NLRB 388, 389 (1975). In addition, the Board pointed to the conclusion in *Hotel Employees Local 2 v Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992) that endorsed *Kroger* and enforced a prehire agreement whereby the employer agreed "to accept the results of a card check in lieu of an NLRB election" because the court found the agreement to be consistent with national labor policy. Based on its clarification, the Board adhered to its original decision in *Goodless I*.

The Board analogized this situation to its long-standing practice of enforcing so-called "after-

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In *NLRB v. Goodless Bros. Elec. Co., Inc.*, 285 F.3d 102 (1st Cir. 2002) (*Goodless IV*), the court disagreed assumption made by the Board in *Goodless III* that it could provide added rationale and reach the same conclusion after accepting the remand from *Goodless II*. Accordingly, the court reversed the Board's decision in *Goodless III* and remanded the case to the Board again with a specific direction to dismiss the case against that particular employer. However, in doing so, the court observed that the Board could have dismissed the complaint as to that particular employer in *Goodless III* but announced that henceforth "its new construction of the contemporaneity requirement would govern this area of the law." 285 F.3d 111. On remand from *Goodless IV*, a substantially new Board panel dismissed the complaint as instructed by the court. *Goodless Electric Co.*, 337 NLRB 1259 (2002) (*Goodless V*). The two new members of the Board panel used the occasion to announce in a footnote that they had not participated in the prior Board decisions and expressed no view as to those decisions.

However, in *Staunton Fuel*, the Board, independent of the *Goodless* litigation, confirmed its adoption of the principle it announced in *Goodless III*, which the court in *Goodless IV* said the Board would be at liberty to do despite its refusal to enforce the Board's *Goodless III* order as to that particular employer. Thus, in *Staunton Fuel*, which issued between *Goodless III* and *Goodless IV*, the Board stated:

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Recently, in *Goodless Electric Co.*, 332 NLRB 1035 (2000), on remand from 124 F.3d 322 (1st Cir. 1977), we found that where the parties' contract language commits the employer to recognizing the union's majority representative status in the future if the union demonstrates that it has majority support, 9(a) recognition will be established if and when the union subsequently meets that condition within the term of the agreement.⁸

⁸We have referred to this procedure as the "third option" for a union to obtain 9(a) status, in addition to the earlier recognized options of (1) winning a Board-certified election, and (2) obtaining the employer's immediate voluntary recognition. *Goodless Electric Co.*, 332 NLRB 719, fn.10. See also *NLRB v. Goodless Electric Co. Inc.*, 124 F.3d at 328–329.

Staunton Fuel, 335 NLRB 719. Based on this Board declaration approving a so-called "third option", I find Goodless III to be controlling precedent in situations, such as this, that involve a collective bargaining agreement, initially executed under Section 8(f), containing a prospective 9(a) recognition clause later satisfied by a showing of the union's majority status.

Based on the *Goodless III* principle, I conclude that Thorpe and Local 295 were bound to agreements from 1995 to 2003 that contained a prospective recognition clause at Article III, Section 3. Therefore, when Williams claimed that Local 295 represented the vast majority of Thorpe's employees at the February 24 meeting and held up the authorization cards in support of that claim, Thorpe was contractually required to recognize Local 295 then and there as the 9(a) representative. And in fact, Miller complied with that contractual requirement on behalf of Thorpe two weeks later when he signed the 2003-2005 MTA.

The fact that the Thorpe representatives failed to inspect the authorization card to verify Local 295's majority claim or take any other steps to verify that claim before Miller executed the new agreement on March 6 is of no moment where, as here, the agreement he executed acknowledged Local 295's majority standing among its mason tenders and recognized that union as their Section 9(a) representative. See *Staunton Fuel*, 335 NLRB 719, fn. 10 and the cases cited there. Likewise, the fact that the parties may have mutually agreed on February 24 to defer actual recognition for the time being while Miller educated himself as to the difference between Sections 8(f) and 9(a) has no significance since he executed the 2003-2005 MTA recognizing Local 295 as the 9(a) representative without qualification and his successors signed two additional MTAs containing the same recognition language.

Because Thorpe erroneously treated the 2006-2008 MTA as an 8(f) agreement, it made no effort here to rebut the presumption that Local 295's majority standing continued after December 5, 2008. Accordingly, I find Respondent violated Section 8(a)(1) and (5), as alleged, by refusing to recognize and bargain with Local 295 after December 5, 2008. Further, it follows that by recognizing and entering into a collective bargaining agreement with the IUPIW as the representative of its mason tender employees at a time when it was legally obliged to recognize Local 295, Thorpe violated Section 8(a)(1) and (2) as alleged.

Conclusions of Law

- 1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. Local 295, a labor organization within the meaning of Section 2(5) of the Act, is the exclusive collective bargaining representative of the following appropriate union of employees within the meaning of Section 9(a) of the Act:

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- All employees wherever and whenever employed by the Employer as Mason Tenders and any other classifications of employees employed to do work within the work jurisdiction of Local No. 295 as determined by the Laborers' International Union of North America concerning work jurisdiction.
- 3. By recognizing and entering into a collective bargaining agreement with the International Union of Public and Industrial Workers, a labor organization within the meaning of Section 2(5) of the Act, applicable to the employees in unit described in paragraph 2, above, Respondent violated Section 8(a)(1) and (2) of the Act.
- 4. By withdrawing recognition from Laborers' Local 295, effective December 5, 2008; by failing to continue in effect the terms of the 2006-2008 MTA after December 5, 2008; by unilaterally granting wage increases to unit employees after December 5, 2008; and by failing to make trust fund payments required under the 2006-2008 MTA after December 5, 2008, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

Remedy

Having found that Thorpe engaged in certain unfair labor practices, my recommended order will require that it be ordered to cease and desist from its unlawful conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Affirmatively, my recommended order requires Thorpe to withdraw and withhold recognition of the IPUIW as the representative of the employees already represented by Local 295, unless and until the IPUIW becomes duly certified by the Board as the collective-bargaining representative of such employees. In addition, Thorpe is required to cease giving any effect to the collective bargaining agreement that it entered into with the IUPIW after December 5, 2008.

In addition, the recommended order requires Thorpe to recognize and bargain with Local 295 as the representative of its mason tender employees. Thorpe is also required to give effect to the 2006-2008 MTA agreement until a new agreement is negotiated or an impasse is reached in the negotiations for a new agreement. If requested by Local 295, Thorpe must also rescind any wage increases unilaterally given to unit employees after December 5, 2008. Finally, Thorpe must make whole employees and the various benefit trust funds provided for under the 2006-2008 MTA for any losses suffered as the result of its failure to give effect to that collective bargaining agreement after December 5, 2008, as provided in *Kraft Plumbing and Heating, Inc.*, 252 NLRB 891 (1980), fn. 2; *Merryweather Optical Company*, 240 NLRB 1213 (1979), and *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest, where appropriate, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

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The Respondent, J.T. Thorpe & Son, Inc., Salt Lake City, Utah, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Refusing to recognize and bargain with Laborers' International Union of North America, Local 295, as the exclusive collective bargaining representative of its employees under Section 9(a) of the National Labor Relations Act, as amended, in the following appropriate unit:

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All employees wherever and whenever employed by the Employer as Mason Tenders and any other classifications of employees employed to do work within the work jurisdiction of Local No. 295 as determined by the Laborers' International Union of North America concerning work jurisdiction.

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(b) Refusing to give effect to the terms and conditions of employment for the employees in the above appropriate unit as set forth in the 2006-2008 Mason Tender & Refractory Agreement until a successor agreement has been negotiated or an impasse has been reached in negotiations.

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(c) Granting employees in the above appropriate unit increased pay rates without giving Laborers' International Union of North America, Local 295, prior notice and an opportunity to bargain concerning any proposed pay rate increases.

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(d) Recognizing and entering into a collective bargaining agreement with the International Union of Public and Industrial Workers as the collective-bargaining representative the employees in the above appropriate unit at a time when it was lawfully required to recognize and bargain with Laborers' International Union of North America, Local 295, as the exclusive representative of the employees in that unit.

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(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) Withhold recognition of International Union of Public and Industrial Workers as the representative of its mason tender employees until that labor organization becomes certified by the National Labor Relations Board as their exclusive collective-bargaining representative.

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(b) Cease giving effect to the collective bargaining agreement entered into with International Union of Public and Industrial Workers applicable to the employees in the above appropriate unit.

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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- (c) On request, bargain with the Laborers' International Union of North America, Local 295, as the exclusive representative of the employees in the above appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.
- (d) If requested by Laborers' International Union of North America, Local 295, rescind any pay rate increases unilaterally given to the unit employees after December 5, 2008.
- (e) Apply the terms and conditions of employment for the employees in the above appropriate unit as set forth in the 2006-2008 Mason Tender & Refractory Agreement until a successor agreement has been negotiated or an impasse has been reached in negotiations.
- (f) Make whole employees and the benefit trust funds provided for under the 2006-2008 Mason Tender & Refractory Agreement for any losses suffered as the result of its failure to give effect to that collective bargaining agreement after December 5, 2008, in the manner set forth in the remedy section of this decision together with interest as provided by law.
- (g) Within 14 days after service by the Region, post at its facilities and job sites in the
 State of Utah, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 5, 2008.
 - (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
- 35 Dated, Washington, D.C. February 26, 2010.

WILLIAM L. SCHMIDT Administrative Law Judge

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¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize and bargain with Laborers' International Union of North America, Local 295, as the exclusive collective bargaining representative of our employees under Section 9(a) of the National Labor Relations Act, as amended, in this appropriate unit:

All employees wherever and whenever employed by the Employer as Mason Tenders and any other classifications of employees employed to do work within the work jurisdiction of Local No. 295 as determined by the Laborers' International Union of North America concerning work jurisdiction.

WELL WILL NOT refuse to give effect to the terms and conditions of employment for our employees in the above appropriate unit as set forth in the 2006-2008 Mason Tender & Refractory Agreement until a successor agreement has been negotiated or an impasse has been reached in negotiations.

WE WILL NOT grant employees in the above appropriate unit increased pay rates without giving Laborers' International Union of North America, Local 295, prior notice and an opportunity to bargain concerning any proposed pay rate increases.

WE WILL NOT recognize and enter into a collective bargaining agreement with the International Union of Public and Industrial Workers as the collective-bargaining representative the employees in the above appropriate unit.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withhold recognition of International Union of Public and Industrial Workers as the representative of our mason tender employees until that labor organization becomes certified by the National Labor Relations Board as their exclusive collective-bargaining representative.

WE WILL cease giving effect to the collective bargaining agreement entered into with International Union of Public and Industrial Workers applicable to our mason tender employees.

WE WILL, on request, bargain with the Laborers' International Union of North America, Local 295, as the exclusive representative of our mason tender employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, if requested by Laborers' International Union of North America, Local 295, rescind any pay rate increases unilaterally given to our mason tender employees after December 5, 2008.

WE WILL apply the terms and conditions of employment for our mason tender employees as set forth in the 2006-2008 Mason Tender & Refractory Agreement until a successor agreement has been negotiated or an impasse has been reached in negotiations.

WE WILL make whole our employees and the benefit trust funds provided for under the 2006-2008 Mason Tender & Refractory Agreement for any losses suffered as the result of our failure to give effect to that collective bargaining agreement after December 5, 2008, together with interest as provided by law.

		J.T. THORPE & SON, INC. (Employer)	
Dated	By		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 17th Street, 7th Floor, North Tower Denver, Colorado 80202-5433 Hours: 8:30 a.m. to 5 p.m. 303-844-3551.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 303-844-6647.